STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2005
v	No. 252501 Wayne Circuit Court
ROBERT LEE GILES, a/k/a SWEET, ROBERT BURGAN and BERNARD HARRIS, Defendant-Appellant.	LC No. 03-004739-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for attempted possession of less than twenty-five grams of cocaine, MCL 750.92; MCL 333.7403(2)(a)(v). Defendant was sentenced to two years' probation. We affirm.

Defendant first contends that the charges should be dismissed as the result of prosecutorial misconduct arising out of misrepresentations regarding the status of a res gestae witness and the failure to use due diligence to produce the witness at trial. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct "for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To demonstrate plain error, the defendant must show that: "(1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights." *Id.* (citation omitted). The third factor requires that the defendant demonstrate that the error was outcome determinative. *Id.* Even if all of these elements are shown, this Court may not reverse unless the error resulted in the conviction of an actually innocent person or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

The prosecution has a continuing duty to advise the defense of all res gestae witnesses whom the prosecutor intends to produce at trial, to provide notice of known witnesses, and to give reasonable assistance in locating witnesses at the request of the defense. *People v Snider,* 239 Mich App 393, 422-423; 608 NW2d 502 (2000). Although the jury instruction regarding the inference which a trier of fact may draw from a prosecutor's failure to produce a res gestae witness is no longer applicable in many respects, under some circumstances an instruction regarding the inference which can be drawn from the absence of a witness is appropriate, as

when the prosecutor fails without excuse to secure the presence at trial of a listed witness or fails to give the requisite assistance to the defendant to locate and serve process on a witness. *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003).

The trial court found that the prosecution did not use due diligence in procuring the presence of an officer at trial. As a remedy, the trial court agreed to take notice of the adverse witness instruction and infer that the officer's testimony would have been unfavorable to the prosecution. This remedy adequately protected defendant's rights. Furthermore, testimony at trial established that the missing officer was securing the rear of the building and did not directly observe or participate in the events. Consequently, defendant has failed to demonstrate how the prosecution's failure to produce this witness prejudiced the outcome of the trial.

Defendant next contends that he is entitled to a new trial because the trial court made insufficient and erroneous findings. We disagree. This Court reviews a trial court's factual findings for clear error. MCR 2.613(C); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Clear error exists when a reviewing court is left with the definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). Furthermore, a trial court does not need to make specific findings of fact regarding each element of the crime, where it is "manifest that the court was aware of the factual issue, that it resolved the issue, and that further explication would not facilitate appellate review." *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992). After examining the record, we are not left with the conviction that the trial court's findings were either insufficient or clearly erroneous.

In making its findings the trial court summarized the testimony of the only two witnesses presented at trial and then found defendant guilty beyond a reasonable doubt. This summary indicated that the trial court believed the officers' testimony that the house exhibited signs that it was previously vacant and, by inference, that it was being used for drug activity. Furthermore, the trial court's statement that there was testimony that the door was ajar 12 to 16 inches simply demonstrated that the trial court refused to accept defendant's trial counsel's suggestion that the door could not have been that far open. Given that the officer who struggled to open the door testified that he put his foot in the door *and forced himself up against it*, we cannot say that this finding was contrary to the testimony presented. Furthermore, as defendant's trial counsel noted in closing, this case came down to a credibility assessment of the officer who testified that he saw defendant toss the baggie of cocaine, and the trial court's findings indicate that it decided that credibility issue in favor of the officer. There was no error warranting reversal.

Finally, defendant argues that the prosecution failed to present sufficient evidence to support his conviction. We disagree. We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). When reviewing an insufficiency of the evidence claim in a criminal case, "this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004), citing *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard is deferential

and requires that this Court "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra*, 462 Mich at 400.

In order to prove a defendant guilty of possession of less than twenty-five grams of cocaine the prosecution must prove beyond a reasonable doubt that: (1) the defendant possessed cocaine and was not authorized to possess the substance, (2) the defendant knew he possessed cocaine, and (3) the substance was in a mixture weighing less than twenty-five grams. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *Id.* at 526. An attempt offense consists of (1) an attempt to commit an offense prohibited by law and (2) any act towards the commission of the intended offense. *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

At trial the prosecution presented testimony by an officer that he saw defendant toss a baggie that was later found to contain cocaine. Viewing this testimony and the other evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski